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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 636

BARRY M. GOLDWATER, *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION and the UNITED STATES OF AMERICA *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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October , 1964

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FEDERAL COMMUNICATIONS COMMISSION and the UNITED STATES OF AMERICA, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a Writ of Certiorari issue, to the United States Court of Appeals for the District of Columbia Circuit to review that court's judgment in the above-entitled case entered on October 27, 1964.

OPINION BELOW

The opinion of the Federal Communications Commission in the above-entitled matter entered on October 21, 1964, denying Petitioner relief is printed as part of the record, and is contained in the Joint

Appendix. The United States Court of Appeals for the District of Columbia Circuit affirmed the order of the Commission on October 27, 1964, by an equally divided Court; but has not yet filed its opinion. The order of the Court of Appeals is contained in the Joint Appendix.

JURISDICTION

The order of the Federal Communications Commission involved herein was entered on October 21, 1964. Petitioner's appeal to the United States Court of Appeals for the District of Columbia Circuit was filed in that Court, pursuant to section 402 of the Communications Act of 1934 and 5 U.S.C. § 1032, on October 22, 1964, and the judgment of that Court was entered on October 27. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), and under 5 U.S.C. § 1040.

STATUTORY PROVISIONS INVOLVED

The statutory provision which governs decision of this case is section 315 of the Communications Act of 1934, 47 U.S.C. § 315, which is as follows:

> § 315. (a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, that such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate. *Appearance by a legally qualified candidate on any—*
>
> *(1) bona fide newscast,*
>
> *(2) bona fide news interview,*

(3) bona fide news documentary (if the appearance of candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

(b) The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.

(c) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section. (Matter in italics added in 1959—73 Stat. 557)

QUESTIONS PRESENTED

The question presented is:

Whether the Respondent Federal Communications Commission was correct in determining under section 315 of the Communications Act of 1934 that Petitioner, the duly nominated and legally qualified Republican candidate for President of the United States, was not entitled to "equal time" without charge on the national television and radio broadcast networks after

the duly nominated and legally qualified Democratic candidate for President of the United States, at his own request, had used such networks without charge to broadcast a speech dealing with current international events, when foreign affairs is one of the major issues in the 1964 Campaign for the Presidency of the United States.

STATEMENT OF THE CASE

Commencing on Saturday, October 17, 1964, the three national radio and TV networks, The American Broadcasting Company, The Columbia Broadcasting System, Inc. and the National Broadcasting Company, carried announcements that at 8:30 P.M., Eastern Daylight Time, on Sunday, October 18, 1964, they would carry a speech by President Lyndon B. Johnson—who is the legally qualified Democratic candidate for President of the United States. The use of the facilities of the three networks for such speech was requested on behalf of the President, by the White House Press Office.

At the time and on the date mentioned for the broadcast, all three networks did carry a speech by President Lyndon B. Johnson, lasting for approximately 19 minutes, dealing with events abroad. Specifically the speech related to the explosion of an atomic device by the Communist Government of China on October 16; a change of government in the Union of Soviet Socialist Republics on October 15; and a change of government in the United Kingdom on October 15. The said speech was provided to and carried by all the networks' affiliated radio and television stations throughout the United States without cost to such stations and with-

out charge to President Lyndon B. Johnson, the Democratic National Committee, or any other political committee or organization supporting President Johnson's election, the cost of originating and transmitting the program to their affiliated stations being borne by the respective networks.

One of the major issues in the 1964 Presidential Campaign is the issue of the handling of foreign policy by President Johnson and associates in his Administration. (Address to the Nation by Senator Goldwater, October 9, 1964, ABC Television Network.)

The Chairman of the Republican National Committee, Dean Burch, acting in behalf of the Republican nominee for President of the United States, Petitioner Senator Barry M. Goldwater, both before and after the speech by President Lyndon B. Johnson, demanded "equal time" for Senator Goldwater without charge from each network, but this demand was rejected. Thereupon, Mr. Burch filed a complaint with the Federal Communications Commission requesting them to direct the networks to furnish Senator Barry Goldwater with "equal time" under Section 315 of the Communications Act without charge.

On October 21, 1964, this request was denied by order and written opinion of the Commission. On October 22, 1964, the Petitioner, Senator Barry Goldwater, sought review of such denial by the United States Court of Appeals for the District of Columbia Circuit. That Court on October 27, 1964 affirmed the Commission's determination by an equally divided Court.

REASONS FOR GRANTING THE WRIT

A. Introductory

The decision of the Federal Communications Commission and of the Court of Appeals is of transcendent importance, involving as it does the election of a President of the United States and the right of the electorate to be informed concerning the issues in the campaign. In this context the matter decided is one of first impression in the Courts, and it is imperative that this matter be decided correctly.

The Commission denied Petitioner's request for "equal time" on alternative grounds:

> (1) On the basis of a decision made during the Presidential Campaign in 1956, wherein the Commission held, in a divided decision, the day before the election, that the Democratic candidate for President, the Honorable Adlai E. Stevenson, was not entitled to "equal time" resulting from the use of the network facilities by the Republican candidate, President Dwight D. Eisenhower, to report on October 31, 1956, to the American people on the Suez crisis. F.C.C. Public Notices 38337, 38387; 14 P. & F.. R.R. 720.
>
> (2) On the basis that the broadcast of the President's speech constituted "on-the-spot coverage of bona fide news events" within the meaning of Section 315 (a)(4); that the President was speaking in his capacity as President and not in his capacity as a candidate for President.

Petitioners submits that both grounds for the Commission's decision are erroneous, and without foundation or basis in law.

B. The Federal Communications Commission and the Court of Appeals Have Here Decided a Vitally Important Question Under Section 315 of the Communications Act Affecting the Election of the President of the United States. The Question Has Not Heretofore Been But Should Be Determined By This Court

The Federal Communications Commission and the Court of Appeals have determined that Petitioner, a legally qualified candidate for the office of the President of the United States, is not entitled to be afforded "equal time" to President Lyndon B. Johnson under the circumstances of this case. This decision not only affects Petitioner and the radio and television networks, but it affects the right and ability of the American people to hear both sides of the issues and thus to intelligently exercise their democratic prerogative of indepedently voting for and electing the President of the United States.

The Commission has heretofore issued three rulings concerning the application of Section 315 to Presidential elections. One of these, the so-called Suez case, discussed *infra*, was decided after equal time had been given and was never appealed. The other two cases, *CBS*, 14 P.&F., R.R. 524 (1956) (in which the Commission ruled that a spot announcement wherein President Eisenhower, then a candidate for re-election, appeared appealing for the Community Fund Drive constituted a "use" requiring "equal time" to all other candidates) and *CBS*, F.C.C. 64-887, 56865 (September 30, 1964) (holding that the full broadcasting of a Presidential news conference would be subject to the "equal time" requirement) were not appealed.

In view of the fact that these cases necessarily arise in fast-moving political campaigns, it is extremely

difficult for the important questions they raise to reach this Court. In this context this case affords a unique opportunity for this Court to consider the important questions raised under Section 315 which vitally affect the American voting public.

C. The Federal Communications Commission in Deciding This Case, and the Court of Appeals in Affirming It, Incorrectly Interpreted Section 315 of the Communications Act

Section 315 of the Communications Act originated in Section 18 of the Radio Act of 1927 and was carried forward to Section 315 in the Communications Act of 1934. The language of the Section is crystal clear—"If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, ..." The Section appears to admit of no exception, other than those added in 1959, and indeed the Commission has repeatedly so ruled. For example, in the *Lar Daly* case, 18 P. & F., R. R. 701 (1959), the Commission held that the broadcasting of news clips and interviews, which the candidate neither originated nor controlled, but in which he appeared, required the licensee to provide equal time to all other candidates for the same office.

This interpretation of Section 315 as admitting of no non-statutory exception is more than adequately reinforced by the legislative history. Senator Dill, the author of Section 18 of the Radio Act, stated during a colloquy on the floor of the Senate at 67 Cong. Record 12502: ". . . This provision simply says that if a radio station permits one candidate for a public office to address the listener it must allow all candidates for that public office to do so, and to that extent there must be no discrimination. . . ." and again he stated ". . . I

think it would be better to deny it altogether than to allow the candidate of one party to broadcast and the candidate of the other party not be able to secure the same right." The legislative history contains numerous other examples of similar interpretations placed on the Section by its authors and other members of the enacting Congress.

In spite of the commanding clarity of Section 315, the Commission in 1956 attempted to create a non-statutory exception for addresses by an incumbent Presidential candidate concerning events of importance to the public. Although both the *Suez* decision, 14 P. & F., R. R. 720 (1956), and the instant case involve foreign affairs, there is nothing in the Commission decision necessarily limiting this created exception to that subject. The Commission's holding leads to a logical position of complete abnegation of the Section 315 safeguards as applied to candidates for the office of President. It is clear that Congress did not intend any unwritten exception for incumbent Presidents either in 1927, in 1934 or in 1959. This is illustrated by the action of Congress in suspending the application of Section 315 to the Presidential Campaign of 1960 and refusing to suspend it for the 1964 Campaign.

We contend that the *Suez* case was incorrectly decided and that Section 315 contains no unwritten exception for addresses by an incumbent President.

The Commission in the alternative based its decision on Section 315(a)(4) which was added in 1959 and exempts from the equal time requirement "on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto)." The Commission indicates that

once the network exercises its good faith judgment that the appearance of the candidate is a bona fide news event, Section 315(a)(4) is applicable. We contend that such a construction of Section 315(a)(4) is patently incorrect.

The legislative history of the 1959 amendments establishes that the four exceptions were added to the statute primarily to lessen the effect of the *Lar Daly* case, *supra*, regarding coverage of news events *not under the control of a candidate whose appearance is incidental to the news event.* Subsequent interpretations of these provisions including the September 30, 1964 CBS ruling, *supra*, affirm this interpretation.

Petitioner contends that as a matter of law President Lyndon B. Johnson's address on October 18, 1964, carried by all three networks at his special request could not come within the meaning of the term "on-the-spot coverage of bona fide news events" as those words are used in Section 315. Any other interpretation is tantamount to repealing Section 315 insofar as it applies to incumbent Presidential candidates.

D. Since the Presidential Election With Which This Petition Is Concerned Will Be Held on November 3, 1964, It Is Important That Petitioner Have an Immediate Hearing

A quick determination of the questions presented by this case is of vital importance to all concerned—and we emphasize that the mass of American voters is equally concerned with the parties hereto. The critical nature of the issues has caused Petitioner to file this petition at the earliest possible moment following the judgment of the Court of Appeals. After the election has passed, the question becomes moot because the person requesting equal time is no longer a candidate

and has no legal right to time. *Daly* v. *United States* (No. 11946, 7th Cir.), cert. denied, 355 U.S. 826, rehearing denied, 355 U.S. 885 (1957).

CONCLUSION

For the foregoing reasons, it is respectfully submitted:

(1) This petition for a Writ of Certiorari should be granted.

(2) This case should be set down for argument at the earliest practicable time.

Respectfully submitted,

GERALD D. MORGAN
Counsel for the Petitioner

Of Counsel:

HAMEL, MORGAN, PARK & SAUNDERS

MILLER AND SCHROEDER

Arthur H. Schroeder
William H. Bradford, Jr.
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John B. Kenkel
John P. Bankson, Jr.

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APPENDIX

1

WESTERN UNION TELEGRAM

RBA076 422P EDT OCT 18 64 WA 129 1964 OCT 18 PM 4 24
(RB) PD AR FAX WASHINGTON DC 18 342P EDT
E WILLIAM HENRY
3464 MACOMB ST WASHDC

WE DEMAND EQUAL AND FREE TIME FOR SENATOR GOLDWATER TO ANSWER PRESIDENT JOHNSON SPEECH TONIGHT. WE SUGGEST THE SAME HOUR MONDAY NIGHT. WOULD APPRECIATE A REPLY BY RETURN TELEGRAM
DEAN BURCH.

RECEIVED
OFFICE OF
OCT 19 1964
E. WILLIAM HENRY
CHAIRMAN

2

SENT OCTOBER 18, 1964

TELEGRAM

CHAIRMAN DEAN BURCH
REPUBLICAN NATIONAL COMMITTEE
1625 EYE STREET, N. W.
WASHINGTON, D. C.

REURTEL OCTOBER 18 TO CHAIRMAN HENRY REQUESTING QUOTE EQUAL AND FREE TIME FOR SENATOR GOLDWATER TO ANSWER PRESIDENT JOHNSON'S SPEECH TONIGHT, UNQUOTE AND YOU SUGGEST THE SAME HOUR MONDAY NIGHT. YOUR REQUEST FOR QUOTE EQUAL OPPORTUNITIES UNQUOTE SHOULD INITIALLY BE MADE TO THE NETWORKS. IN THE EVENT YOU FEEL AGGRIEVED AT THE NETWORKS' DISPOSITION OF YOUR REQUEST, THEN YOUR COMPLAINT SHOULD BE DIRECTED TO THIS COMMISSION.

BEN F. WAPLE, SECRETARY
FEDERAL COMMUNICATIONS COMMISSION

3

AWUB006 PA242
P WA395 PD FAX WASHINGTON DC 18 1003PEDT
E WILLIAM HENRY, FEDERAL COMMUNICATIONS COMMISSION
NEW POST OFFICE BLDG
PENNSYLVANIA AVENUE AND 12TH ST WASHDC

AFTER WATCHING TONIGHT'S SPEECH BY PRESIDENT JOHNSON WE REISSUE OUR DEMAND FOR EQUAL FREE TIME FOR SENATOR GOLDWATER. C

PRESIDENT JOHNSON GAVE OUT NO NEW FACTS, DIDN'T EVEN NAME THE NEW RUSSIAN LEADERS, AND GENERALLY DISCLOSED NOTHING THAT HAS NOT ALREADY BEEN THOROUGHLY REPORTED IN THE PAST FEW DAYS.

HE EXPRESSED AN ARGUMENT THAT THE UNITED STATES WILL STAND STRONG AGAINST THE THREAT OF COMMUNISM WHICH IS, OF COURSE, OPEN TO DEBATE BASED ON HIS ADMINISTRATION'S RECORD.

THE SPEECH WAS UTTERLY POLITICALLY MOTIVATED. IN THE INTEREST OF FAIR PLAY, WE DEMAND EQUAL TIME TO ANSWER IT.

DEAN BURCH REPUBLICAN NATIONAL CHAIRMAN
(33).

RECEIVED
OFFICE OF
OCT 19 1964
E. WILLIAM HENRY
CHAIRMAN

137A EDT OCT 19 64

RECEIVED
OCT 19 1964
F.C.C.
OFFICE OF GENERAL COUNSEL

4 REPUBLICAN NATIONAL COMMITTEE
1625 Eye Street Northwest
Washington, D. C. 20006
NAtional 8-6800

DEAN BURCH
Chairman

October 19, 1964

The Honorable E. William Henry, Jr.
Federal Communications Commission
Washington, D. C. 20554

Dear Sir:

On Sunday, October 18, 1964, at 8:30 p.m., all of the national networks broadcast a speech by Lyndon B. Johnson, Democratic candidate for President of the United States. Time was cleared for the broadcast by each of the networks without charge to anyone.

Prior to and subsequent to the broadcast telegrams were dispatched by the undersigned to Mr. Robert Kintner of the National Broadcasting Company, Mr. Leonard Goldenson of the American Broadcasting Company and Dr. Frank Stanton of the Columbia Broadcasting System, demanding equal time for Senator Barry M. Goldwater under Section 315 of the Communications Act of 1934, as amended, since the Johnson speech was plainly political and since Mr. Johnson and Mr. Goldwater are both duly qualified candidates for the office of President of the United States. We continue to demand equal time.

The broadcast itself and the circumstances surrounding it indicate that none of the exceptions to Section 315(a) of the Communications Act is applicable, particularly as that Section is construed in the letter to Columbia Broadcasting

System of September 30, 1964 (FCC 64-887; Mimeo. 56865). It is clear that the program was not a bona fide newscast since it was not regularly scheduled nor was it a bona fide news interview because it was limited to an appearance by the President. It was not a bona fide documentary because it was solely under the control of Mr. Johnson and not the networks which broadcast it, and it can hardly be said that the appearance of the candidate was incidental to the subject or subjects covered. Finally, it was not on-the-spot news because the subjects discussed by the President were the removal and replacement of Premier Khrushchev and the detonation of a nuclear device by the Chinese People's Republic. Both of these occurrences and numerous interpretations of them were reported by all media and were well known to everyone two days or more before last night's broadcast. They have also been subject to considerable analysis in special programs on the major networks.

5 Furthermore, a substantial number of promotional announcements for the Johnson speech were broadcast by the networks, a further indication that the President was not making news in his pre-arranged speech. As the Commission pointed out in the letter to CBS, one of the bases for not excepting news conferences from Section 315 was the fact that they, in the same manner as the President's speech, " . . . are called by the candidates solely in their discretion and at times they specify." Because of the numerous promotional announcements of last evening's broadcast, which are in effect part of the broadcast itself, equal time for these announcements is also respectfully requested.

This morning we were notified that the American Broadcasting Company and the National Broadcasting Company have refused our demand for equal time for Mr. Goldwater.

This refusal invokes the jurisdiction of the Federal Communications Commission to consider our demand for equal time and the refusal of these networks to provide such time.

It is respectfully requested that the Commission direct each of the three major national networks to provide equal time to Senator Barry M. Goldwater upon a determination that last night's speech was not an exempt use under Section 315 of the Act. This is apparent from a consideration of the letter of September 30, 1964 (FCC 64-887, Mimeo. 56865) to Columbia Broadcasting System, Inc. previously referred to. Last night's broadcast required no editorial effort or judgment whatsoever on the part of the networks; rather it was a presentation without editing of a speech by a candidate for President of the United States involving issues which are clearly relevant to the present political campaign.

We are advised that on Saturday, October 17, efforts were made to purchase time for the President's speech last night from one of the networks, thus indicating awareness on the part of the Democratic National Committee of the possibility of a demand for equal time. When it became apparent that the networks were unable or unwilling to clear paid time, we are further informed that a meeting of the National Security Council was convened to endorse the speech in advance. This is merely a patent political device to justify a request for free time which was later made and granted by the networks.

6 Under the foregoing circumstances, it is respectfully requested that the Commission direct each of the three major national networks to provide equal time to

Senator Barry M. Goldwater to reply to last evening's speech by Mr. Johnson.

With best regards, I am

Very truly yours,

DEAN BURCH
Chairman, Republican
National Committee

cc

Commissioner Rosel H. Hyde
Commissioner Robert T. Bartley
Commissioner Robert E. Lee
Commissioner Frederick W. Ford
Commissioner Kenneth A. Cox
Commissioner Lee Loevinger
Secretary Ben F. Waple
Mr. Robert Kintner
Mr. Leonard Goldenson
Dr. Frank Stanton

7

RECEIVED
OFFICE OF
OCT 19 1964
E. WILLIAM HENRY
CHAIRMAN

WUB112 AA059
A CMB031 PD 2 EXTRA LANCASTER SOCAR 19 1011A EST
CHAIRMAN FEDERAL COMMUNICATIONS COMM
WASHDC

PRESIDENT JOHNSON HAD PREVIOUSLY CONVEYED REASSURANCES TO NATION BY RADIO ON EVENTS OF PAST WEEK. SUNDAY NIGHT ADDRESS WAS ADMINISTRATION POLICY DELINEATION, POLITICAL. NOW I DEMAND FULL FACILITY EQUAL TIME TUESDAY SAME HOUR ORIGINATING CHARLOTTE, N.C. PLEASE CONFIRM

LOUIS E JAECKEL PRESIDENT NOMINEE AMERICAN PARTY

(35).
1153A EDT OCT 19 64

RECEIVED
OCT 19 1964
F. C. C.
OFFICE OF THE SECRETARY

8 NATIONAL BROADCASTING COMPANY, INC.
A Service of Radio Corporation of America
1725 K Street, N. W., Washington 6, D. C.
EMerson 2-4000

HOWARD MONDERER
Washington Attorney

October 19, 1964

BY HAND

Federal Communications Commission
Washington, D. C. 20554

Dear Sirs:

This is in reply to your request for NBC's comments on whether the broadcast made by President Johnson on its television and radio facilities last night requires NBC to give equal time to each of his opponents in the current Presidential election.

Of course you are familiar with the three major developments in world affairs (changes in the governments of the Soviet Union and Great Britain and the detonation of a nuclear device by Red China) which gave rise to the broadcast, and with the contents of the broadcast. The President, on the recommendation of the National Security Council and in his role of Chief Executive of the United States, requested time to address the nation concerning these most important and grave international developments.

As you will recall, in 1956 President Eisenhower, who was then the Republican Party candidate for reelection to the Presidency, requested and was furnished broadcast

time to make a similar address concerning important developments in the Middle East. We requested a ruling as to whether that broadcast constituted an appearance which required us to furnish equal time to all of President Eisenhower's opponents for the Presidency. When a definitive ruling was not issued promptly (see Commission telegrams to the three networks of November 1, 1956 (14 RR 720)), we furnished equal time to several of his opponents including minority party candidates, because of the brief time remaining prior to Election Day. President Eisenhower then requested time equal to that furnished his opponents.

The Commission thereupon made a further examination of the problem and "reached a conclusion that we do not believe that when Congress enacted Section 315 it intended to grant equal time to all Presidential candidates when the President uses the air lanes in reporting to the Nation on an international crisis." (Commission telegram to the three networks of November 5, 1956 (14 RR 722)).

Thus, the Commission ruled the broadcast by President Eisenhower had not been a "use" requiring time to be given to his opponents. In effect, our having given time to those opponents required us in turn to make available to President Eisenhower free time equal to that given his opponents.

Were NBC to furnish equal time to President Johnson's opponents in the current Presidential election, the clear precedent of the Commission's Eisenhower ruling of 1956 would require us to give additional free time to President Johnson.

It might be noted that since 1956, Congress has not questioned the Commission's Eisenhower ruling, and in addition has enacted broad restrictions on the scope of the equal opportunity requirements of Section 315. Not only is the 1956 Eisenhower ruling a clear precedent, but the exemption added in 1959 for "on-the-spot coverage of bona

fide news events" (Section 315(a)(4)) also would apply. Certainly an address by the President of the United States made upon the recommendation of the National Security Council concerning outstanding international developments is a news event within the meaning of the statute.

That the Commission has continued to adhere to the Eisenhower precedent appears clear from the text of the Commission's ruling of September 30, 1964, in which the Commission ruled that the press conferences of President Johnson were not exempt from the equal opportunity requirements of Section 315. The Commission there stated that its ruling did "not extend to extraordinary and unusual factual situations"—an unmistakable reference to the type of situation which occurred in 1956 and, we believe, now.

Thus, in light of the Commission's Eisenhower ruling in 1956 and the later enactment of the exemption for on-the-spot coverage of bona fide news events, NBC is not required by Section 315 to furnish equal time in this situation to all of President Johnson's opponents.

There is attached for the Commission's information a copy of a telegraph dated October 19, 1964, to Dean Burch, Chairman of the Republican National Committee, from William R. McAndrew, Executive Vice President, NBC News.

Respectfully submitted,

/s/ HOWARD MONDERER
Howard Monderer

RECEIVED
OCT 19 1964
F. C. C.
OFFICE OF THE SECRETARY

11 *Copy of Telegram Dated 10/19/64*

Dean Burch
Chairman, Republican National Committee
1625 I Street, N. W.
Washington, D. C.

Dear Mr. Burch:

I am replying to your two telegrams of October 18, 1964, in which you request "equal and free time" for Senator Goldwater to answer the address made over NBC facilities on October 18 by President Johnson. It is our considered judgment that the President was making a report to the nation on three major developments in world affairs. The appearance of the President in his role as Chief Executive of this country to discuss matters of such grave importance to the people of the United States does not in our opinion constitute a use of NBC facilities within the meaning of Section 315 of the Communications Act of 1934, which would compel NBC to give equal opportunity to other Presidential candidates.

The FCC, in our judgment, established this principle in 1956 in a ruling which arose out of the somewhat comparable appearance by President Eisenhower during the election campaign that year. Therefore we respectfully decline your request that NBC grant equal opportunity to Senator Goldwater because of the President's appearance.

However, in a spirit of fairness we are prepared to give time for discussion of the Republican viewpoint on
12 the international developments referred to by the President. If Senator Goldwater were to be the spokesman, this would obligate NBC to grant further equal opportunity to all legally qualified minority party candidates. Consequently we will make available to you personally as Chairman of the Republican National Commit-

tee an approximate 15-minute period tonight, Monday, October 19, at 8:30 PM NYT.

If you desire to use this opportunity to express the Republican viewpoints on developments in Russia, China and Great Britain please telephone me at the National Broadcasting Company, Circle 7-8300, New York, New York.

WILLIAM R. MCANDREW
Executive Vice President,
NBC News

13

SWUB124 WA168
(TL) TLX045 THIS MESSAGE RECEIVED DIRECT FROM SENDER VIA WU
TELEX TLX PD
NEW YORK NY 19 1132A EDT

HENRY GELLER GENERAL COUNSEL

FEDERAL COMMUNICATIONS COMMISSION WASHDC
FOLLOWING IS A COPY OF A WIRE SENT TO DEAN BURCH CHAIRMAN REPUBLICAN NATIONAL COMMITTEE 1625 EYE STREET N W WASHINGTON D C

WE HAVE YOUR TELEGRAM OF OCTOBER 18, 1964 REQUESTING EQUAL AND FREE TIME ON THE ABC NETWORK TO REPLY TO PRESIDENT JOHNSON'S ADDRESS OF THE SAME DATE.

WE ADVISED MR. GULAY OF YOUR COMMITTEE AFTER RECEIPT OF YOUR TELEGRAM YESTERDAY THAT WE WOULD RESPOND TODAY AFTER WE HAD AN OPPORTUNITY TO REVIEW CAREFULLY THE CONTENT OF THE PRESIDENT'S ADDRESS.

WE HAVE CONSIDERED THIS MATTER AND HAVE CONCLUDED THAT THE COVERAGE OF THIS EVENT IS EXEMPT FROM THE REQUIREMENTS OF SECTION 315 OF THE COMMUNICATIONS ACT.

WE THEREFORE MUST RESPECTFULLY DENY YOUR REQUEST IN THIS INSTANCE

JULIUS BARNATHAN VICE PRESIDENT AND GENERAL MANAGER ABC TELEVISION NETWORK

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RECEIVED
OCT 19 1964
OFFICE OF GENERAL COUNSEL

AWU B124 ZQ

14 Mr. Dean Burch
Republican National Committee
1625 I St., N. W.
Washington, D. C.

We respectfully deny your request for equal time under Section 315 of the Communications Act on CBS radio and television networks in response to the appearance last night of President Johnson on those networks in which the President spoke to American people on recent international events. In light of nature of the President's request for time and the circumstances surrounding it, we do not believe that the President's appearance is covered by Section 315 so as to require equal time for all eligible Presidential candidates.

Richard S. Salant
Vice President and
Special Assistant to the President
Columbia Broadcasting System, Inc.

Read over phone by CBS
October 19, 1964

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15. Democratic National Committee
1730 K street, N. W.
Washington, D. C. 20006

(Received October 19, 1964)

October 19, 1964

The Honorable Chairman William Henry
Federal Communications Commission
New Post Office Building
Pennsylvania Avenue at Twelfth Street
Washington, D. C.

Dear Mr. Chairman:

I understand that the Republican National Committee has charged that the Democratic National Committee

sought to buy time for the non-partisan report to the nation by the President last night.

This letter is to assure you that no such effort was made. Arrangements for this broadcast, I assume, were handled in a routine manner through the White House.

We were making numerous inquiries for network program time during the week for our advertising effort, as we have done for the past several weeks. But these inquiries were in no way related to the President's national security address.

Sincerely,

/s/ LLOYD WRIGHT
Lloyd Wright
Media Coordinator

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16 NATIONAL BROADCASTING COMPANY, INC.
A Service of Radio Corporation of America
1725 K Street, N. W., Washington 6, D. C.
EMerson 2-4000

HOWARD MONDERER
Washington Attorney

October 19, 1964

BY HAND

Henry Geller, Esq.
General Counsel
Federal Communications Commission
Washington, D. C. 20554

Dear Mr. Geller:

You have asked us to state whether the Democratic National Committee or its representatives made any efforts to buy time from NBC for Sunday, October 18, 1964, and, if so, the circumstances.

A representative of the Johnson For President Committee who had been discussing for several weeks the

availability of time periods for political sponsorship with the NBC Political Broadcast Unit, telephoned a representative of that Unit late Friday afternoon, October 16, and requested information as to available time on Sunday for a paid political broadcast. On Saturday, the necessary information as to availabilities, costs and preemption charges was assembled and NBC was preparing to offer four separate time periods for political sponsorship.

Before NBC could supply this information to the representative of the Johnson For President Committee, the National Security Council made its recommendation that the President address the nation. The White House Press Secretary, who usually makes such requests on behalf of the President, thereupon requested, through the usual news channels, time on all networks for the Presidential address which was made.

We do not believe that the request for information of the representative of the Johnson For President Committee is material to the Commission's consideration of whether the broadcast actually made was a "use" within the meaning of Section 315. Whether any broadcast time would have been purchased on NBC and what the subject of such broadcats might have been are speculative. The broadcast actually made must be judged on its own.

17

Respectfully,

/s/ HOWARD MONDERER
Howard Monderer

18 AMERICAN BROADCASTING COMPANY
1124 Connecticut Avenue, N. W., Washington 6, D. C.
Executive 3-7700

ALFRED R. BECKMAN
Vice President

October 19, 1964

Mr. Henry Geller
General Counsel
Federal Communications Commission
Washington, D. C.

Dear Mr. Geller:

You have made telephone inquiry as to whether the Democratic National Committee, or any similar Democratic Party source, made a request to buy time over the week end just passed.

This is to inform you that no such request for paid political time was received by the American Broadcasting Company television network.

Sincerely yours,

/s/ ALFRED R. BECKMAN
Alfred R. Beckman

By hand

19

COLUMBIA BROADCASTING SYSTEM, INC.
2020 M Street, N. W., Washington, D. C. 20036
Telephone (202) 296-1234

JOSEPH DEFRANCO
Assistant General Attorney

(Received October 19, 1964)

F.C.C. Office of the Secretary

October 19, 1964

Hon. Ben F. Waple
Secretary
Federal Communications Commission
Washington, D. C.

Dear Mr. Waple:

We have been requested by the Commission to ascertain whether any request had been made of CBS by the Democratic National Committee for the purchase of broadcast time for the weekend of October 17-18, 1964, for an appearance by the President of the United States to discuss international affairs.

This is to advise you that I have made inquiry and have ascertained that no such request was made to CBS.

Very truly yours,

/s/ JOSEPH DEFRANCO

20 FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

58365

Public Notice—B

October 19, 1964

SECTION 315 MATTER

The Commission today determined that the President's broadcast on October 18, 1964, is not a "use" within Section 315 of the Communications Act, and does not entitle other legally qualified candidates for the Presidency to equal time.

The Commission's opinion will follow.

— FCC —

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21 FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

58446

Public Notice—B

October 21, 1964

LETTER TO REPUBLICAN NATIONAL COMMITTEE

After consideration of the complaints of Dean Burch, Chairman of the Republican National Committee, and of Louis Jaeckel, presidential nominee of the American Party, for "equal time", the Commission today issued its opinion which held that the three networks could correctly determine that a report by the President on specific, current events affecting the country's security was exempt from the equal-opportunities requirement of Section 315(a) of the Communications Act. The Commission based its conclusion on consideration of a 1956 ruling and the 1959 amendments to Section 315.

The Commission pointed out that a similar situation arose during the 1956 campaign, when President Eisenhower used 15 minutes of radio and television time to address the Nation with respect to the extraordinary international situation in the Middle East (the so-called Suez crisis). The Commission then ruled that President Eisenhower's address was exempt, because the "equal time" provision is not applicable "when the President uses the air lanes in reporting to the Nation on an international crisis." That 1956 ruling has constituted the Commission's construction of the law in this respect for the ensuing eight-year period, and, the Commission held, is in point here, in view of the nature of the President's report and the extraordinary and specific current international events involved.

In 1959 Congress amended Section 315(a) to provide that "on-the-spot coverage of bona fide news events . . . shall not be deemed use of a broadcasting station within the meaning of this subsection." The Commission found that Mr. Burch had not shown that the networks acted incorrectly in their judgment in this case. The Commission stated:

> "The events on which the President reported—the replacement of the head of state of the Soviet Union and the explosion of a nuclear device by Communist China—are news events of an extraordinary nature. We think that the networks could properly determine that the President's report, expressing the United States Government's policy in relation to those events, was a spot news event in the sense intended by the 1959 amendments; that it was not only a report to the Nation setting forth the Government's position, but that it also advised other nations as to that position and the response of the United States to the events. In short, we think that the networks could reasonably conclude that statements setting forth the foreign

policy of this country by its Chief Executive in his official capacity constitute news in the statutory sense. Simply stated, they are an act of office of the President of the United States."

22 The Commission further pointed out that its ruling is in line with the legislative history, quoting the following statement made by Senator Pastore in urging the need for the 1959 Amendment:

> "If the President of the United States were a candidate for reelection he could not stand up in front of the American flag and report to the American people on an important subject without every other conceivable candidate standing up and saying, 'I am entitled to equal time.'"

The Commission therefore concluded, on the basis of the facts, past precedent, the terms of the statute, and its pertinent legislative history, that the networks acted within the "reasonable latitude for the exercise of good faith news judgment . . ." (105 Cong., Rec. 16313) and that the President's report of October 18, 1964 is not a "use" within the meaning of Section 315.

The letter was adopted on October 21 at a session of the Commission attended by Commissioners Henry (Chairman), Hyde, Bartley, Lee, Ford, Cox and Loevinger. Commissioner Hyde dissented and will issue a statement; Commissioner Bartley concurred in part and dissented in part and issued a statement.

The letter and Commissioner Bartley's statement are attached; Commissioner Hyde's statement will be issued shortly.

Attachments

— FCC —

23 FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON 25, D. C.
20554

October 21, 1964

FCC 64-955
57888

Mr. Dean Burch
Chairman
Republican National Committee
1625 Eye Street, N.W.
Washington, D. C. 20006

Dear Mr. Burch:

We have your complaint of October 19, 1964, as well as a complaint of Mr. Louis E. Jaeckel, the nominee of the American Party for the Presidency. Your complaint is directed to the failure of the three networks to grant your request for "equal time" for Senator Goldwater, the Republican candidate for the Presidency, to reply to President Johnson's report on October 18, 1964, 8:30 p.m. E.D.T. We have considered the complaint and the material supplied by the networks with relation to it.

The facts may be briefly set forth. Indeed, they are posed by the opening paragraphs of the President's report:

> "On Thursday of last week, from the Kremlin in Moscow, the Soviet Government announced a change in its leadership.
>
> "On Friday of last week, Communist China exploded a nuclear device on an isolated test site in Sinkiang.
>
> "Both these important events make it right that your President report to you—as fully and clearly as he can. That is what I mean to do this evening."

There then followed an address on these topics (and the recent British election) (for a transcript of the report, see P. A-10 of the Washington Post, October 19, 1964).

Delivery of the report to the Nation had been recommended by the National Security Council.

Following delivery of the President's report, the three networks, on October 19, 1964, denied your requests for equal time. Their position is that under the law the President's report is not a "use" within the meaning of Section 315, Communications Act of 1934, as amended, 47 U.S.C. 315.

The issue presented is thus whether the broadcast of a report of the President to the American people concerning specific, current and extraordinary international events constitutes a "use" within the scope of Section 315 of the Communications Act. For the reasons set forth within, we hold that it does not. Our holding is based upon (1) consideration of a 1956 ruling and, alternatively, (2) the 1959 Amendments to Section 315.

24 1. A similar situation arose during the 1956 campaign, when President Eisenhower used 15 minutes of radio and television time to address the Nation with respect to the extraordinary international situation in the Middle East (the so-called Suez crisis). To the question whether "equal opportunities" had to be afforded other Presidential candidates, the Commission (one Commissioner dissenting on the merits and two on procedural grounds not going to the merits) concluded "that we do not believe that when Congress enacted Section 315 it intended to grant equal time to all Presidential candidates when the President uses the air lanes in reporting to the Nation on an international crisis." 14 Pike & Fischer, R.R. 720.

This 1956 ruling, which has represented the agency's construction of the statute in this respect for the ensuing eight-year period, is in point here, in view of the nature of the President's report and the extraordinary and specific current international events involved. Thus, under

applicable precedent, the broadcast of the President's report on October 18th is not a "use" within Section 315.

We note that the Commission's 1956 action was fully reported to the Congress in 1957 (see 23rd Annual Report of the Federal Communications Commission, pursuant to Section 4(k) of the Communications Act, pp. 121-122). Congress was thus aware of the agency's construction of the statute. Congress re-examined the concept of "use" in connection with the extensive 1959 Amendments to Section 315, but did not alter or comment adversely upon the above-noted 1956 ruling. It has been held that legislative re-enactment of a statute's provision, after administrative construction thereof, gives legislative sanction to that construction. See, e.g., *Corn Products Ref. Co.* v. *Commissioner*, 350 U.S. 46, 53. While we recognize that the application of this doctrine of legislative re-enactment is only an aid to construction (see *Helvering* v. *Reynolds*, 313 U.S. 428, 432), we think that this circumstance (i.e., an unusual ruling highlighted in a report to Congress two years prior to its extensive reconsideration of the area encompassed by the ruling) bolsters our decision to adhere to the ruling.

2. In 1959 Congress amended Section 315(a) to provide that "on-the-spot coverage of bona fide news events . . . shall not be deemed use of a broadcasting station within the meaning of this subsection" (Section 315(a)(4)). NBC has advised us that it denied your request for equal time because "an address by the President of the United States made upon the recommendation of the National Security Council concerning outstanding international developments is a news event within the meaning of the statute." The question presented is whether, in the circumstances of this case, this broadcast falls within "the reasonable latitude for the exercise of good faith news judgment on the part of the [licensee]" (105 Cong. Rec. 16313) and is thus exempt.

We do not believe that you have shown that the networks acted incorrectly in their judgment in this case. Rather, we think that the broadcaster could correctly determine that a report by the President on specific, current international events affecting the country's security falls within the exemption of Section 315(a)(4).

25 The events on which the President reported—the replacement of the head of state of the Soviet Union and the explosion of a nuclear device by Communist China—are news events of an extraordinary nature. We think that the networks could properly determine that the President's report, expressing the United States Government's policy in relation to those events, was a spot news event in the sense intended by the 1959 Amendments; that it was not only a report to the Nation setting forth the Government's position,[1] but that it also advised other nations as to that position and the response of the United States to the events.[2] In short, we think that the networks could reasonably conclude that statements setting forth the foreign policy of this country by its chief executive in his official capacity constitute news in the statutory sense. Simply stated, they are an act of office of the President of the United States.

You rely upon the Commission's *CBS* ruling of September 30, 1964 (FCC 64-887, Mimeo 56865), and state that as in that case, the report here was also subject to call by the President and was under his control. But as

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[1] This consideration is, we think, the short answer to the contention that these events were well-known to everyone two days before the broadcast and had been the subject of considerable analysis by the news media. Similarly, the pre-broadcast announcements made by the networks are not pertinent to the determination to be made; such announcements would customarily be made before any such Presidential report.

[2] See, for example, the four-point program set out as to what the United States intended to do with respect to the Communist Chinese nuclear explosion.

the September 30th ruling makes clear, these considerations are pertinent only to the question of whether there has been a "bona fide news interview." See H. Rept. No. 1069, 86th Cong., 1st Sess., p. 4. They were not cited, or in any way considered, in connection with the issue of "on-the-spot coverage of a bona fide news event" (Section 315(a)(4)). Indeed, the terms of the statute establish that no such considerations are pertinent in the case of (a)(4), since the exemption under (a)(4) explicitly includes ". . . political conventions and activities incidental thereto"—such as a candidate's acceptance speech, the content or time of delivery of which is clearly not within the control of the network. See H. Rept. No. 802, 86th Cong., 1st Sess., p. 7.

Further, the September 30th *CBS* ruling is not in point as to this situation. We are not here concerned with press conferences of the major candidates, and even in connection with such conferences, we stated: "We stress that our ruling with respect to Section 315(a)(4) is limited to the matters raised in your letter and does not extend to extraordinary and unusual factual situations." As NBC points out, that statement has reference to the Suez-type situation, where the President is reporting to the Nation on the Government's position with respect to specific current international events affecting the country's security. Exemption of such extraordinary reports under Section 315(a)(4) does no violence to the thrust or scheme of Section 315, nor is it in any way inconsistent with the legislative history. On the contrary, it is fully in line with the Congressional purpose.

26 The bills dealing with the 1959 *Lar Daly* decision originally contained no explicit exemption for on-the-spot coverage of news events. See S. 1585, S. 1604, S. 1858, and S. 1929, Hearings Before the Communications Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 86th Cong., 1st Sess., pp. 2-4. Commissioner Ford, with the concurrence of five Commis-

sioners, suggested that there be such an exemption "for newscasts and special events" (*id.* at pp. 80-81), and this suggestion was the subject of great interest by the Subcommittee (*id.* at pp. 138-40, 220). To the specific request that further explanation be given as to what was meant by the term, "special events", Commissioner Ford specified that in addition to political conventions, the term encompassed ". . . a broadcast by a public official on a subject of unusual significance of an official character involving the safety or welfare of the Nation . . ." (*id.* at p. 298). The exemption for "on-the-spot coverage of news events" (S. 2424) evolved from this background.[3]

On the floor, Senator Pastore, the bill's floor manager, affirmed that "the words 'news events' would necessarily have reference to current events of news importance" (105 Cong. Rec. 16345); and Senator Scott, another member of the Commerce Committee, referred to the definition of "news" as "of current interest" (*id.* at p. 16347). Finally, Senator Pastore, in pointing up the need for amendments, stated (*id.* at p. 14456):

> "If the President of the United States were a candidate for reelection he could not stand up in front of the American flag and report to the American people on an important subject without every other conceivable candidate standing up and saying, 'I am entitled to equal time.'".

There remains consideration of the term, "bona fide", as used in Section 315(a)(4). Chairman Harris stated (105

[3] See, also, pp. 92, 94-95 of the House Hearings (Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 86th Cong., 1st Sess.). Thus, at p. 95, Commissioner Ford stated as one example of a special news event, " . . . a President speaking on a very serious international crisis". See also the Westinghouse statement at p. 180, referring "for example, to a Presidential talk on a national crisis, made during a campaign, by a President running for reelection . . . ".

Cong. Rec. 17782) that this term ". . . sets up a test which appropriately leaves reasonable latitude for the exercise of good faith news judgment on the part of broadcasters . . . and [that] it is not intended that the exemption shall apply where such judgment is not exercised in good faith [but rather] for [the] purpose [of promoting] the political fortunes of the candidate making an appearance." See, also, H. Rept. No. 1069, p. 4, 86th Cong., 1st Sess., p. 2. There is nothing before us to indicate that the
27 broadcast coverage accorded the President's report was anything but "bona fide", i.e., that it stemmed from anything but a good faith judgment by the radio and television networks as to its newsworthiness.[4]

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[4] Your letter states: " . . . on Saturday, October 17, efforts were made to purchase time for the President's speech last night from one of the networks, thus indicating awareness on the part of the Democratic National Committee of the possibility of a demand for equal time. When it became apparent that the networks were unable or unwilling to clear paid time, we are further informed that a meeting of the National Security Council was convened to endorse the speech in advance." The Democratic National Committee asserts that it made no such efforts, and CBS and ABC have stated that they received no Democratic Party requests to buy time over the weekend in question. NBC states that " . . . a representative of the Johnson For President Committee who had been discussing for several weeks the availability of time periods for political sponsorship with the NBC Political Unit, telephoned a representative of that Unit late Friday afternoon, October 16, and requested information as to available time on Sunday for a paid political broadcast; [that] on Saturday, the necessary information as to availabilities, costs and preemption charges was assembled and NBC was preparing to offer four separate time periods for political sponsorship; [that] before NBC could supply this information to the representative of the Johnson For President Committee, the National Security Council made its recommendation that the President address the nation; [and that] the White House Press Secretary, who usually makes such requests on behalf of the President, thereupon requested,

We conclude, therefore, on the basis of the facts, past precedents, the terms of the statute, and its pertinent legislative history, that the networks acted within the "reasonable latitude for the exercise of good faith news judgment . . . (105 Cong. Rec. 16313), that the President's report of October 18, 1964, was not a "use" within the meaning of Section 315, and that the several other candidates for the office of Presidency are not entitled to equal time. We stress that, as is customary in this field, our ruling is based on the facts of this case and is limited to those facts.

This ruling was adopted by the Commission on October 21, 1964.*

By Direction of the Commission
Ben F. Waple
Secretary

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through the usual news channels, time on all networks for the Presidential address which was made."

What is apparently involved is thus a reque for information as part of a continuing "several weeks" discussion. But even assuming *arguendo* that the request to NBC was concerned with any of the topics covered in the President's report (and as NBC points out, this and any purchase of time is speculative), the decision by the National Security Council was made prior to NBC's supplying any information and stands on its own footing.

* Commissioner Bartley's statement, concurring in part and dissenting in part, is attached. Commissioner Hyde dissented, and his opinion will be issued shortly.

STATEMENT OF COMMISSIONER ROBERT T. BARTLEY CONCURRING IN PART AND DISSENTING IN PART

I agree that the broadcast was not a "use" within the meaning of Section 315 on the basis of the ruling set forth in paragraph 1, page 2. That ruling is dispositive of the question. I dissent to issuance of the alternative holding.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 18,963

BARRY M. GOLDWATER, *Petitioner*,

v.

UNITED STATES OF AMERICA, and the
FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

Certificate of Ben F. Waple, Secretary, Federal Communications Commission

I, Ben F. Waple, Secretary, Federal Communications Commission do hereby certify that the attached list is a true and correct list of the materials comprising the record in the proceeding before the Federal Communications Commission in the above-entitled case, including the Commission's Determination and all Documents presented and considered by the Commission in reaching said Determination.

Witness my hand and Seal of the Federal Communications Commission this 22nd day of October, 1964.

FEDERAL COMMUNICATIONS COMMISSION
BEN F. WAPLE
Secretary

Attachment "A"

30 FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

58479

PUBLIC NOTICE—B

October 22, 1964

DISSENTING OPINION OF
COMMISSIONER ROSEL H. HYDE

I dissent to the ruling approved October 21, by a majority of the Commission in the matter of the complaint dated October 19, 1964, of the Chairman of the Republican National Committee against the refusal of the ABC, CBS and NBC networks to afford the Republican candidate for the Presidency equal opportunity under the provisions of Section 315 of the Communications Act of 1934, as amended.

The essential facts as they appear in the complaints and responses are that the networks broadcast a presentation October 18, 1964, by the President—who is also the Democratic candidate for the Presidency—without compensation to the networks, but refused to provide a similar opportunity to the Republican candidate for the same office.

Because of the confusion regarding actual meaning of Section 315 created by the citation of an an administrative ruling of 1956, which did not prevent the honoring of a claim for equal time and various assertions as to the meaning of the section, it is necessary to refer to the words of the statute as approved by Congress. Prior to the 1959 amendments, Section 315 read as follows:

> "Sec. 315. (a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates

for that office in the use of such broadcasting station: Provided, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate."

31 As is clear from the words of the statute, no exceptions as to the application of the equal opportunity requirement were provided and no discretion was given the Commission to exempt any person or any form of presentation from the equal opportunities requirement. The 1956 administrative ruling cited by the respondents and by the majority opinion presumed to provide an exception for the purposes of a presentation by a President who was at the same time a candidate for reelection. But the "exception" thus enunciated never had application in fact, and was never subjected to judicial review. Equal time was, in fact, given by the networks though it would not have been required pursuant to the ruling. The rigid requirements of the statute as it formerly read, the lack of any provision giving the administering agency discretion as to its application, resulted in the main in strict rulings such as the 1959 Lar Daly decision. This led to a Congressional review and the enactment of amendments approved in September 1959, providing the flexibility of four enumerated, specifically-defined exceptions and also imposing a requirement of reasonable opportunity for discussion of conflicting issues, even as to "(1) bona fide newscast, (2) bona fide news interview, (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto)" which are matters otherwise exempted from the equal opportunity requirements of the statute.

Congress having reviewed the administrative application of the statute and having provided four carefully defined and enumerated exceptions to the equal time requirements of Section 315, it is not only contrary to logic and accepted principles of statutory construction but absurd to hold that Congress also approved an administratively-contrived exception which it did not mention and which had had no application in so far as actual operating practice or reliance upon it is concerned. The fact that Congress did not provide still another exception such as the 1956 administrative effort in its precise enumeration does not mean it gave approval of the same by silence; rather, it could only mean that it did not give approval.

32 The provisions of Section 315 as approved by Congress are as follows:

"Sec. 315.

(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate.

"Appearance by a legally qualified candidate on any—

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

33 Congress, of course, is well aware of the characteristics of broadcast communication and especially its recognized effectiveness, especially in political matters. In general, candidates seek maximum exposure for the reason that the greater the exposure the greater the opportunity to attract and influence voters. Broadcasting can uniquely provide an immediacy and personal touch in simultaneous communication to millions. It is recognized that any appearance of a candidate can serve political purposes. An appearance with disclaimer of political purpose can unintentionally or otherwise serve that purpose as well or perhaps better than an avowed political presentation. Except in most untoward circumstances, an appearance will constitute a benefit or, in other words, a use as a practical matter. Another characteristic peculiar to broadcasting is its ability to report not just news about events but actual events frequently including personalities in news-making situations.

In connection with the equal opportunities concept and the fairness principle, it must also be observed that in a political contest, the overall issue for the voters is the comparison of candidates and resolution of the issue in favor of one or the other. In connection with this kind of

an issue, it seems to me that elementary fairness as well as public interest considerations would require reasonable opportunity for the presentation of both personalities.

The majority opinion relies on the 1956 ruling which has been shown to have no validity and alternatively on a holding that the broadcast by the President on October 18, falls within the exemption of Section 315(a)(4) as "on-the-spot coverage of bona fide news events". Two networks, ABC and CBS, assert that the President's address was exempt from the requirements of Section 315, but give no specific reasons for their respective positions. NBC gives the two reasons now advanced in the majority opinion and also says that if Senator Goldwater were to be the spokesman in the time allotted the Chairman of the Republican National Committee, it would obligate NBC to grant further equal opportunity to all legally-qualified minority party candidates. The implication of this would seem to be that NBC would not consider the comment of one of the two major candidates for the Presidency on dramatic changes in international affairs as news while at the same time taking an opposite view as to the views of the other candidate.

It is not my purpose to attempt to define what is and what is not news. However, in view of the requirements of Section 315, the networks should be required to explain their position in holding that the presentation of discussion on dramatic world events by one candidate is bona fide news coverage while at the same time holding that the presentation of discussion on the same subject by the other major candidate is not news. I do not observe any such discrimination in the news attention given the candidates by other forms of news media.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 18,963

BARRY M. GOLDWATER, *Petitioner*,

v.

UNITED STATES OF AMERICA, and the
FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

**Certificate of Ben F. Waple, Secretary,
Federal Communications Commission**

I, Ben F. Waple, Secretary, Federal Communications Commission do hereby certify that the attached material submitted, supplements the record previously filed in the above-entitled case.

Witness my hand and Seal of the Federal Communications Commission this 23rd day of October, 1964.

FEDERAL COMMUNICATIONS COMMISSION
BEN F. WAPLE
Secretary